Supreme Court, U.S.
FILED
FEB 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-789

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOE T. GONZALES, PETITIONER

v.

SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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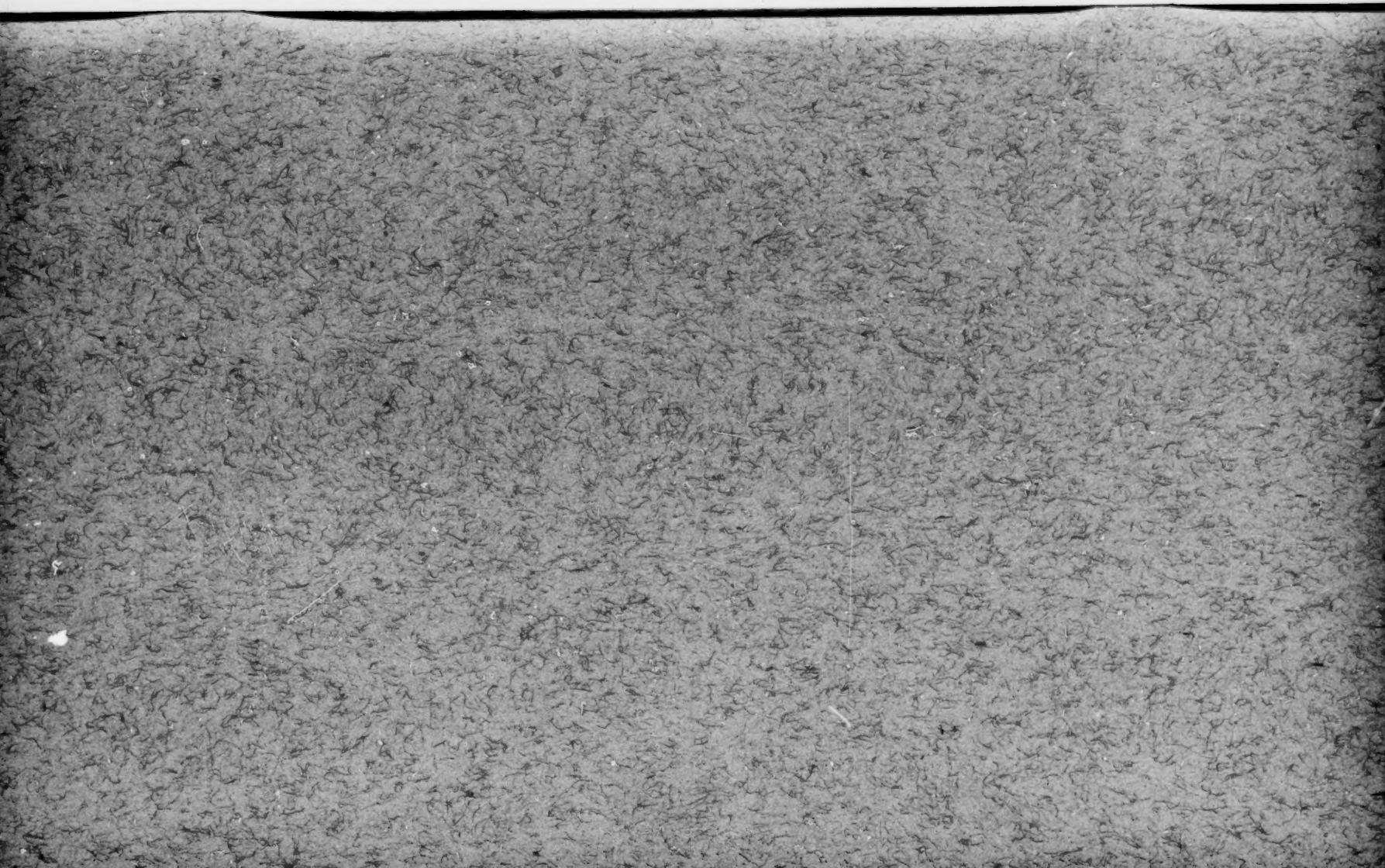

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the courts below misapplied Fed. R. Civ. P. 15(c) in holding that he could not amend his complaint to add a new party after the statute of limitations had expired.

1. In 1981, petitioner filed an administrative claim of discrimination against the Air Force. At that time, and at all subsequent stages of this litigation, petitioner was represented by counsel. The Air Force rejected petitioner's claim, and on March 15, 1985, that decision was finally affirmed by the Equal Employment Opportunity Commission (EEOC). Pet. App. 5A-6A.

Under Section 717(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), petitioner then had 30 days within which to file an action in district court against "the head of [his] department." On April 12, 1985, two days before the expiration of the statutory period, petitioner filed a suit against the Department of the Air Force

(Department), rather than against the head of that Department, the Secretary of the Air Force (Secretary). Petitioner served process on the Department on April 30, 1985, 16 days after expiration of the 30-day Title VII filing period. Almost three months later on July 24, 1985, petitioner also served the United States Attorney. Pet. App. 8A.

On April 30, 1986, the Department moved to dismiss petitioner's complaint because he had failed to file suit against the head of his department – the Secretary – within the Title VII filing period. In response, petitioner sought leave to amend his complaint by adding the Secretary as a defendant. The district court initially granted this motion under Fed. R. Civ. P. 15(c), and on June 2, 1986, petitioner served an amended complaint on the Secretary. Shortly afterwards, however, this Court decided *Schiavone* v. *Fortune*, No. 84-1839 (June 18, 1986), which addressed the circumstances in which an amended complaint that is filed after expiration of a statute of limitations may, under Rule 15(c), "relate back" to the date of filing of the original complaint. Finding *Schiavone* controlling, the district court dismissed petitioner's complaint, holding that petitioner could not add the Secretary as a defendant because the Secretary had not received notice of the suit prior to expiration of the 30-day Title VII statute of limitations. The district court explained that petitioner's original complaint failed to name the proper party and that his amended complaint was out of time. Pet. App. 6A-9A, 18A-20A.

The court of appeals affirmed (Pet. App. 5A-11A). The court noted (*id.* at 8A (citation omitted)) that *Schiavone* had

> set forth four factors upon which "relation back" of an amended pleading under Rule 15(c) depends: "(1) the basic claim must have arisen out of the conduct

> set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period."

Here, noting that petitioner gave notice of the suit to the Secretary more than a year after expiration of the statute of limitations, the court of appeals explained that "[n]o colorable argument can be made that this belated notice satisfies the second and fourth factors of the *Schiavone* test" (Pet. App. 9A). Similarly, the court found that petitioner's service of process on the Department and the United States Attorney "was also received *after* the prescribed limitations period. Having failed to notify the Department and the United States Attorney within the thirty-day period, [petitioner] cannot argue, under *Schiavone*'s third factor, that knowledge of his federal lawsuit is imputed to the Secretary." *Id.* at 9A-10A (emphasis in original). Because petitioner therefore "failed to satisfy the second, third and fourth factors of the *Schiavone* test," the court of appeals held that "the amended complaint did not relate back under Rule 15(c) to the original date of the filing of the action" (*id.* at 10A). The court also noted that, while petitioner and the Department "were involved in lengthy administrative battles for a number of years, the mere fact that administrative proceedings occurred cannot be construed as any kind of notice, whether 'formal' or 'informal,' of a subsequent federal lawsuit" (*ibid.* (footnote omitted)).[1]

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[1] Judge Brown dissented (Pet. App. 11A-17A), reasoning that "[w]hether the Air Force or some functionary in the office of the

2. The court below found its conclusion compelled both by the plain language of Rule 15(c) and by this Court's holding in *Schiavone* v. *Fortune, supra*. That conclusion plainly was correct, and it is consistent with the decision of every court to address the "relation back" of amended complaints under Rule 15(c) since the ruling in *Schiavone*. Further review accordingly is unwarranted.

a. Under Rule 15(c) (emphasis added), an amendment changing the party against whom a claim is asserted relates back to the date of filing of the original complaint only if, "*within the period provided by law for commencing the action against the party* to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Here, the Secretary (concededly the proper defendant "to be brought in by amendment")[2] did

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Secretary is served, the same people at the Department of the Air Force will process the summons, the same Air Force representative will appear in court, and the same entity will shoulder the burden of loss if [petitioner] prevails" (*id.* at 15A).

[2] Petitioner does not challenge the holding below that only the head of the plaintiff's agency is a proper defendant in a suit under Section 717(c) of Title VII, as the lower courts have uniformly held. See, *e.g.*, *McGuinness* v. *USPS*, 744 F.2d 1318, 1322-1323 (7th Cir. 1984) (alternative holding); *Cooper* v. *USPS*, 740 F.2d 714, 716 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985); *Canino* v. *EEOC*, 707 F.2d 468, 472 (11th Cir. 1983); *Hall* v. *SBA*, 695 F.2d 175, 180 (5th Cir. 1983); *White* v. *GSA*, 652 F.2d 913, 916 n.4 (9th Cir. 1981); *Newbold* v. *USPS*, 614 F.2d 46, 47 (5th Cir.), cert. denied, 449 U.S. 878 (1980); *Davis* v. *Califano*, 613 F.2d 957, 958 n.1 (D.C. Cir. 1979). See also *Morgan* v. *USPS*, 798 F.2d 1162, 1165 n.3 (8th Cir. 1986), cert. denied, No. 86-5979 (Mar. 30, 1987) (Rehabilitation Act); *Ellis* v. *USPS*, 784 F.2d 835, 838 (7th Cir. 1986) (Age Discrimination in

not receive notice of the institution of the action "within the period provided by law for commencing the action against the party"—that is, within Title VII's 30-day limitations period. The plain language of Rule 15(c) therefore requires rejection of petitioner's assertion that his attempt to amend his complaint should relate back to the original filing date.

The propriety of this reading of the Rule is confirmed by the Court's decision in *Schiavone* v. *Fortune, supra*. In that case, as in this one, the plaintiff named the wrong party as the defendant; in that case, as in this one, the plaintiff failed to name the proper defendant in the original complaint; in that case, as in this one, the plaintiff then attempted to amend its complaint to name the proper defendant. Applying the plain language of Rule 15(c), the Court found it "inevitably to follow [from the failure to serve any party within the limitations period] that notice to [the proper defendant] and the necessary knowledge did not come into being 'within the period provided by law for commencing the action against' [the proper defendant], as is so clearly required by Rule 15(c)" (slip op. 9). The Court concluded that "[t]his is fatal * * * to petitioners' litigation" (*ibid.*) because "the Rule's phrase 'within the period provided by law for commencing the action' means 'within the applicable limitations period' " (*id.* at 10 (quoting Fed. R. Civ. P. 15 advisory committee notes)). The Court added that its holding would apply even if there had been an "identity-of-interest" between the defendants named in

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Employment Act). Indeed, Congress has not enacted a law permitting agencies to be named as parties defendant in employment discrimination suits, and it is "well established that federal agencies are not subject to suit *eo nomine* unless so authorized by Congress in 'explicit language.' " *Midwest Growers Cooperative Corp.* v. *Kirkemo*, 533 F.2d 455, 465 (9th Cir. 1976) (citation omitted; emphasis in original). See *Blackmar* v. *Guerre*, 342 U.S. 512, 515 (1952).

the original and amended complaints, since "neither [defendant] received notice of the filing until after the period of limitations had run" (*id.* at 8).

Petitioner nevertheless argues that the conditions set forth in *Schiavone* for compliance with Rule 15(c) were satisfied (Pet. 11-14). He contends that the proper defendant, the agency head, received essentially the same notice that he would have received had he been properly named, by virtue of the fact that Air Force litigation is handled the same way " '[w]hether the Air Force or some functionary in the office of the Secretary is served.' " Pet. 12 (quoting Pet. App. 15a (Brown, J., dissenting)).[3] Petitioner also argues that the proper defendant was in no way prejudiced by the initial failure to name him, because the extensive prior administrative proceedings in the case put the Secretary on notice as to the particulars of the case, and should have made the Secretary realize that, but for a mistake, the suit would have been brought against him.

Such an argument is almost identical to that rejected by the Court in *Schiavone*. There, as the dissent pointed out, "the notice that the defendant actually receive[d] [was] just as timely and just as informative as that which would have been received if no mistake[s] had occurred" (slip op. 7 (Stevens, J., dissenting)). The original complaint there put the defendant on notice of the plaintiff's intention to bring suit concerning specifically identified activities being carried on by one of the defendant's internal divisions, which was not itself a suable entity (*id.* at 1-2). As here, however, because service was not effectuated "within the period provided by law for commencing the action"—that is, "within

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[3] Petitioner appears to suggest (Pet. 13) that the Secretary had actual notice of the suit within the 30-day limitations period. But that simply is not so: petitioner failed to serve anyone until April 30, 1985, 16 days after expiration of the statutory period, when he served the Department of the Air Force.

the applicable limitations period" (*Schiavone*, slip op. 10)—the Court found relation back inappropriate because the proper defendant did not receive notice in a manner that was timely under the rule.[4]

Without acknowledging this deficiency in his position, petitioner argues that Title VII should be liberally construed (Pet. 9-10, 14). But the Court has made it clear that there is no basis "for giving Title VII actions a special status under the Rules of Civil Procedure." *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 150 (1984).[5]

There is, however, good reason to apply Rule 15(c) with special force in suits against the federal government. The second paragraph of the Rule was specifically intended to provide persons suing the government a means to protect

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[4] This holding is applicable here even if notice to the Department may be deemed notice to the Secretary for purposes of Rule 15(c), a proposition which we do not concede, since the Department was not served within the limitations period. And as the court of appeals correctly noted, "the mere fact that administrative proceedings occurred cannot be construed as any kind of notice, whether 'formal' or 'informal,' of a subsequent federal lawsuit" (Pet. App. 10A (footnote omitted)).

[5] In fact, the Court in *Schiavone* cited a Title VII case that is virtually identical to this one, in which the court of appeals held that an amendment to a complaint could not relate back when no defendant (let alone the proper one) had been served within the statutory limitations period (slip op. 1 n.1, citing *Cooper* v. *USPS*, 740 F.2d 714, 716 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985)). The *Schiavone* Court also cited with approval Justice White's observation, made in dissent from the denial of a petition for a writ of certiorari in *Cooper*, that the contention of the plaintiff in that case that notice to a federal agency should be imputed to the head of the agency was " 'somewhat weak * * * because, while the complaint was filed within the requisite 30 days, no party was served with process within that period.' " Slip op. 11 n.8 (quoting *Cooper* v. *USPS*, 471 U.S. 1022, 1025 n.3 (1985) (White, J., dissenting from the denial of certiorari)).

themselves against the consequences of naming the wrong federal defendant. That paragraph provides that "[t]he delivery or mailing of process to the United States Attorney * * * or an agency or officer who would have been a proper defendant if named, satisfies the requirements of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant" (Fed. R. Civ. P. 15(c)). Accordingly, if the delivery or mailing of process to any of those persons is accomplished "within the period provided by law for commencing the action against [the proper defendant]" (*ibid.*), an amendment of the complaint naming the proper defendant will relate back to the date of filing of the original complaint. But by failing to serve the United States Attorney within the 30-day limitations period—indeed, until July 24, 1985, more than three months after expiration of the limitations period—petitioner failed to take advantage of this provision.

The legislative background makes it clear that the second paragraph of Rule 15(c) was intended to give uncertain plaintiffs a means of avoiding the risk of failure, by oversight, to name the proper federal defendant. That paragraph was added to the Rule in 1966 in response to four district court decisions that had dismissed suits brought pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g). In each case the plaintiff named a defendant other than the Secretary of Health, Education, and Welfare (the only proper defendant), and in each case the district court denied the plaintiff leave to amend to name the proper defendant. See Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 Harv. L. Rev. 40 (1963). The second paragraph of Rule 15(c) was intended to address this problem by allowing amendments naming

the proper federal defendant to relate back to the filing of the initial complaint—so long as the United States Attorney or other specifically denominated federal official is served within the limitations period. See Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 407-410 (1967). But as the plain language of the second paragraph of Rule 15(c) indicates, the drafters intended this safety net to come into play *only* when the plaintiff served the United States Attorney (or other denominated federal official) within the limitations period.[6] See also *Schiavone*, slip op. 11 n.8. It plainly would be inappropriate to read an additional limitation into the language of Rule 15(c) to benefit plaintiffs who fail to take advantage of the one safety net provided by the Rule.

Given this background, it is not surprising that, as petitioner concedes (Pet. 8-9), there is no decision that conflicts with the holding below: every court to address the question since *Schiavone* has held that a Title VII complaint must be dismissed when it names the wrong defendant and when the plaintiff failed to serve any party within the statutory limitations period.[7] And the courts are

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[6] See Fed. R. Civ. P. 15(c) advisory committee notes (emphasis added) (in the four district court cases giving rise to the 1966 amendment, "the government was put on notice of the claim *within* the stated period—in the particular instances, by means of the initial delivery of process to a responsible government official").

[7] See *Williams* v. *Army & Air Force Exchange Service*, 830 F.2d 27 (3d Cir. 1987); *Koucky* v. *Department of the Navy*, 820 F.2d 300, 302 (9th Cir. 1987); *Bell* v. *Veterans' Administration Hosp.*, 826 F.2d 357, 360 (5th Cir. 1987); *Blair* v. *USPS*, 657 F. Supp. 524, 526 n.2 (S.D. Tex. 1987); *Stewart* v. *USPS*, 649 F. Supp. 1531, 1534-1536 (S.D.N.Y. 1986); *Johnson* v. *USPS*, 113 F.R.D. 73, 76-77 (D. Colo. 1986). See also *Romain* v. *Shear*, 799 F.2d 1416 (9th Cir. 1986), cert. denied, No. 86-1568 (May 18, 1987); *Cooper* v. *USPS*, 740 F.2d 714, 716 (9th

unlikely to have additional opportunities to rule on the issue, since the situation that gave rise to this case is unlikely to recur. Since January 1987, the right-to-sue letter sent to Title VII plaintiffs by the EEOC has stated in capital, underlined type: "*YOU MUST PROVIDE THE NAME OF THE APPROPRIATE DEPARTMENT OR AGENCY HEAD, i.e.*, one acting in an official capacity, named as defendant" (App., *infra*, 1a). The letter also warns that "[f]ailure to provide the name of the *HEAD OF THE DEPARTMENT OR AGENCY* may result in the loss of any judicial redress you may be entitled to" (*ibid.*). See EEOC Dec. Letter, "Notice of Right to File a Civil Action" (Jan. 9, 1987) (*ibid.*).[8] In these circumstances, review of the decision below plainly is not warranted.

Cir. 1984), cert. denied, 471 U.S. 1022 (1985). Petitioner attempts (Pet. 13) to find support in *Paulk* v. *Department of the Air Force*, 44 Fair Empl. Prac. Cas. (BNA) 1473, 1476 (7th Cir. 1987). In that case, however, the court allowed relation back of an amendment where the 30-day Title VII limitations period had been extended to permit a ruling on the plaintiffs' in forma pauperis petition, a ruling that local rules required to be made prior to service. See *ibid.* Petitioner does not claim that the holding of *Paulk*, which was grounded on the peculiar facts of that case, conflicts with the decision here.

[8] When a Title VII plaintiff elects to take his claim directly to district court rather than to the EEOC after an adverse agency decision (see 29 C.F.R. 1613.221(e)), the agency is now similarly obligated to inform the plaintiff "that if you file a civil action, you must name the appropriate Department or Agency head as the defendant. Failure to name the head of the Department or Agency may result in the loss of any judicial redress you may be entitled to. The head of the *(insert official name of Department or Agency)* is *(insert name and official title of Department or Agency Head)*." EEOC, *Federal Sector Complaint Processing Manual MD-107* (Sept. 1, 1987) (App., *infra*, 6a).

b. Petitioner also argues that, even if relation back of his amended complaint is improper under Rule 15(c), the courts below should have considered whether equitable factors allowed the tolling of Title VII's 30-day statute of limitations; he urges the Court to grant review to resolve an asserted conflict in the circuits on the question whether the 30-day filing requirement is jurisdictional (Pet. 15-20). That question, however, is not presented in this case. Petitioner did not argue the equitable tolling issue before the district court, and, though he briefed it at the appellate level, petitioner acknowledges (Pet. 15) that the question was not addressed by the court of appeals. If this Court is to consider the nature of the 30-day filing requirement, it plainly would be preferable to do so in a case where the issue was the subject of a ruling by the court below.

In any event, this case is not a suitable vehicle in which to address the nature of Title VII's statute of limitations because, even if equitable tolling were available in Title VII litigation against the federal government, there would be no equitable grounds here that would excuse petitioner's failure to file a proper complaint within the 30-day period. Like *Baldwin County Welcome Center*, "[t]his is not a case in which a claimant has received inadequate notice; or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon; or where the court has led the plaintiff to believe that []he had done everything required of [him] * * * [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction" (466 U.S. at 151 (citations omitted)). Petitioner contends only (Pet. 4) that the government failed specifically to inform him that he was required to name the Secretary as a defendant in his Title VII action. But this hardly amounts to affirmative misconduct by the government. Petitioner was not a layman who needed

special instruction on the mechanics of Title VII and who was laid low by a statutory technicality; he was represented by counsel throughout the litigation. Section 717(c) on its face specifies the proper defendant, and there was no excuse for the failure by petitioner and his attorney to comply with that explicit requirement. Since petitioner thus could not benefit from a ruling that equitable tolling is allowed under Section 717(c), further review of his claim would be inappropriate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1988

APPENDIX A

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

STATEMENT OF APPELLANT'S RIGHTS

Rev: 1-9-87 R-1

NOTICE OF RIGHT TO FILE A CIVIL ACTION

You are hereby notified that the attached decision in your case is final. You have the right to file a civil action in the appropriate United States District Court *WITHIN THIRTY (30) DAYS* from the date that you receive this decision. If any of your claims were based on the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 633a), *AS TO THOSE CLAIMS ONLY,* you *MAY* have up to six years after the right of action first accrued in which to file a civil action. *See Lehman* v. *Nakshian*, 453 U.S. 156 (1981); 29 U.S.C. § 633a(f); and 28 U.S.C. § 2401(a). You are further notified that if you file a civil action *pro se* (in your own behalf), *YOU MUST PROVIDE THE NAME OF THE APPROPRIATE DEPARTMENT OR AGENCY HEAD, i.e.*, one acting in an official capacity, named as defendant. Failure to provide the name of the *HEAD OF THE DEPARTMENT OR AGENCY* may result in the loss of any judicial redress you may be entitled to.

APPOINTMENT OF COUNSEL

If you decide to file a civil action and do not have or are unable to obtain the services of an attorney to act on your behalf, under Title VII of the Civil Rights Act of 1964, 42

U.S.C. § 2000e *et seq.*, as amended, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 and 794c, as amended, you may request that the Court appoint an attorney to represent you and may also permit you to file the civil action without payment of fees, costs, or security. If you want to request appointment of an attorney, your request must be *FILED WITH THE COURT WITHIN THIRTY (30) DAYS* from the date that you receive the Commission's decision.

NOTICE OF RIGHT TO REQUEST REOPENING

The Commissioners may, in their discretion, reopen and reconsider the decision in your case if you submit a written request and argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involves an erroneous interpretation of law or regulation or misapplication of established policy; or

3. The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

AGENCY REQUESTS AND ANY SUPPORTING ARGUMENTS, must be submitted within the 30 day time frame for filing a request to reopen. *ALL REQUESTS* must be submitted to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900 Falls Church, Virginia 22041.

FILING A REQUEST TO REOPEN WITH THE COMMISSION MAY NOT EXTEND THE TIME PERIOD ALLOWED FOR FILING A CIVIL ACTION. IF YOU WISH TO PRESERVE YOUR RIGHT TO FILE A CIVIL ACTION, THE CIVIL ACTION SHOULD BE FILED WITHIN THE TIME ALLOWED, EVEN IF YOU DECIDE TO REQUEST REOPENING BY THE COMMISSION.

/s/ Dolores L. Rozzi

DOLORES L. ROZZI, DIRECTOR
Office of Review and Appeals

APPENDIX B

Annex 3

REGULAR APPEAL RIGHTS

(For all Allegations of Discrimination other than Age)
(Quote)

APPEAL RIGHTS

1. An appeal may be filed with the Equal Employment Opportunity Commission within *20 calendar days* of receipt of this decision. The *20-day* period for filing an appeal begins to run on the day after the date of receipt of this decision. The appeal must be postmarked, or in the absence of a postmark, received by the Commission within *20 calendar days* of the date of receipt of this decision. Statements or briefs in support of the appeal may be submitted up to *30 calendar days* from the date the appeal is filed. The regulation providing for appeal rights, 29 Code of Federal Regulations (CFR) Section 1613.233, is reproduced below pursuant to 29 CFR Section 1613.221(e).

"Section 1613.233 Time limit.

(a) Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this part, the decision of

an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a decision to award attorney's fees or costs is made, the decision will not be final until the procedure is followed for determining the amount of the award as set forth in Section 1613.271(c).

(b) When issues of discrimination have been raised in a negotiated grievance process, a complainant may file a Notice of Appeal of such issues up to 20 days after: (1) receipt of an agency decision on the grievance and expiration of the time during which the union and the agency may move the matter to the next stage of the grievance process;* (2) receipt of an arbitrator's award; or (3) receipt of the decision of the FLRA on exceptions to the arbitrator's award.

(c) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that cir-

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* NOTES TO AGENCY.

1. The jurisdiction of the Office of Review and Appeals is based on a complainant's timely submission of an appeal *after* his/her receipt of an agency's decision on the grievance *and* expiration of the time during which the union and the agency may move the matter to the next stage of the grievance process. For record purposes and for determining jurisdiction on appeal, agencies should insure that grievance decisions specify when the term for moving the grievance to the next step of the grievance process expires.

2. If the complaint is a mixed case complaint, the notice of appeal rights must be appropriately modified to comport with the procedures set forth in 29 C.F.R. § 1613.405(e). See the sample notices in Appendix B, Chapter 6, Section 3 of this manual, entitled "Processing Mixed Case Complaints."

cumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal."

2. In lieu of an appeal to the Commission, a civil action may be filed in an appropriate United States District Court within *30 calendar days* of receipt of the decision.

3. If an appeal to the Commission is filed, a civil action may be filed in a United States District Court within *30 calendar days* of receipt of the Commission's final decision.

4. A civil action may also be filed any time after *180 calendar days* of the date of initial appeal to the Commission, if a decision has not been rendered.

5. If a civil action is filed, and complainant does not have, or is unable to obtain the services of a lawyer, the complainant may request the court to appoint a lawyer to represent him/her. In such circumstances as the court may deem just, the court may appoint a lawyer and may authorize the commencement of the action without the payment of fees, costs or security. Any such request *must* be made within the above referenced *30-day* time limit for filing suit and in such form and manner as the court may require.

6. You are further notified that if you file a civil action, you must name the appropriate Department or Agency head as the defendant. Failure to name the head of the Department or Agency may result in the loss of any judicial redress you may be entitled to. The head of the *(insert official name of Department or Agency)* is *(insert name and official title of Department or Agency Head)*.

7. Appeals to the Commission should be forwarded to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041. Any state-

ment or brief in support of the appeal must be submitted to the Commission, with a copy to the agency within *30 calendar days* of filing the Notice of Appeal.

Sincerely,

(Signature block)

(Unquote)

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60300